No. 12563

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MOULTON & POWELL AND J. K. CHEADLE, APPELLEES

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v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES, APPELLANT

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CITATIONS

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OPINION BELOW

The district court did not write an opinion.

JURISDICTION

The United States invoked the jurisdiction of the district court under the Act of August 28, 1890, 26 Stat. 316, as amended, 50 U. S. C., sec. 171, for the purpose of condemning the property of the Priest Rapids Irrigation District. On the day the district court entered final judgment in that proceeding (R. 9–19) appellees filed a "Petition for Payment of At-

torneys' Fee" (R. 2–8). For the reasons stated in the Argument (p. 15–16 *infra*), it is believed the district court had no jurisdiction to entertain the petition. The district court's order for the payment of fees was entered March 10, 1950 (R. 32–33). Notice of appeal was filed March 10, 1950 (R. 34). The jurisdiction of this Court is invoked under 28 U. S. C., sec. 1291.

QUESTIONS PRESENTED

1. Whether the money paid into court to satisfy a judgment in condemnation, which will either be returned to the Government or paid to those who claim to be former owners of the property condemned pursuant to a future determination, may be used to compensate the lawyers who represented the former owners in the condemnation proceeding.

2. Whether at the conclusion of a proceeding brought by the United States to condemn property the district court has jurisdiction to fix and order payment of attorneys' fees.

STATEMENT

This is an appeal (R. 3) from an order which directs "that the sum of $55,000 shall be * * * withdrawn from the deposit of $422,252.80 for the benefit of the Priest Rapids Irrigation District, for the payment of attorney fees for the prosecution of this action in behalf of said district" and that the clerk of the court "issue and deliver check in said amount of $55,000 to Moulton & Powell and J. K. Cheadle" (R. 32–33).

The services for which they would be paid by the order appealed from were performed in the proceeding brought by the United States to condemn the properties to which the Priest Rapids Irrigation District had legal title. The judgment entered in that proceeding was reviewed by this Court on appeal and cross-appeal (No. 11704) and resulted in an opinion reported as *United States* v. *Priest Rapids Irr. Dist.*, 175 F. 2d 524. The facts disclosed by that record which are pertinent upon this appeal are as follows:

The condemnation proceeding was commenced on May 12, 1944, after the United States had acquired all the potentially irrigable land in the District. On that day the United States filed an amended petition in condemnation (R. 11,704, pages 106–118) and a declaration of taking (R. 11,704, pages 119–130) and deposited $170,500 as estimated just compensation. The petition alleged (R. 11,704, pages 117–118):

> That the real property * * * described * * * constitute[s] all of the operating properties and facilities owned * * * by the Priest Rapids Irrigation District * * *. That petitioner, United States of America, by reason of its ownership of all the real property lying within the boundaries of said * * * District is * * * the equitable owner of the real property * * * described * * *, subject only to the lien of the bonded indebtedness of said * * * District, and said * * * District * * * now holds legal title thereto in trust for the use and benefit of [the] United States of America. That the sum of $170,500.00 deposited in the registry of this

> court with the filing of declaration of taking * * * represents a sum which * * * is sufficient to pay and discharge all bonded indebtedness of said * * * District.

On February 12, 1945, the District answered by Messrs. Moulton & Powell (R. 11,704, pages 161–167). It asserted that on February 23, 1943,[1] the properties condemned had a value of $1,060,685, that the property owners in the District on that date were entitled to receive this amount, and asked for an order that the compensation when determined should be paid to it "as trustee for the use and benefit of all property owners in the district as of February 23, 1943."

After the Government's demurrer to this answer was sustained (R. 11,704, pages 181–182) the District on September 21, 1945, filed another on which issue was joined (R. 11,704, pages 182–191). This answer was also prepared by Moulton & Powell. Therein, after alleging it had title to property "not used exclusively in the delivery of irrigation water" of the value of $847,815 and of property used in the operation of its irrigation system worth $182,870, the District reiterated the claim for the former owners in the following terms (R. 11,704, pages 187–188):

> IX
>
> That this defendant prior to February 23, 1943, held the naked legal title to all the district

[1] On February 23, 1943, an order of immediate possession was entered (R. 11,704, pages 12–16) and the answer alleged (idem, page 165) that possession taken under that order compelled the District to cease operation.

property as trustee for the landowners entitled to receive water from the district and * * * now alleges that the owners of land within the district were the equitable owners of all the district property when the district was compelled to cease functioning as such, and are now entitled to receive and to have distributed to them all compensation which shall be awarded as just compensation for the taking of the district assets.

X

That this defendant is duly organized and existing irrigation district under the laws of the State of Washington, and its affairs are administered by B. Salvini and J. H. Evett as duly elected and qualified directors, and R. S. Reierson as its duly appointed and qualified secretary. * * * That the values of the assets above described should be determined by a trial before a jury and just compensation for the taking of the same thereby determined and that payment thereof should be made to Priest Rapids Irrigation District * * *. That when said payment is made the defendant may then pay the assets to the persons entitled thereto in liquidation proceedings instituted in the Superior Court of the State of Washington. That this defendant alleges that the persons entitled to said assets are the legal owners of the real property within the district as of February 23, 1943.

XI

That in the alternative and only in the event this court should deny the right of the Priest Rapids Irrigation District to collect the just

> compensation for the property above described then the Court should appoint B. Salvini, J. H. Evett and R. S. Reierson as trustees to liquidate the assets of the district, to have the just compensation determined for the taking of the assets of the district and to collect the same and pay and distribute the assets to the persons who were landowners on February 23, 1943, on the basis of the ratio of the acreage held by each landowner to the total acreage in private ownership on said last named date.[2]

Thus, the issue between the parties was plain. On the one hand the Government contended that, by reason of its ownership of all the lands in the District, it was equitable owner of the properties condemned and, having paid the District's debts, was entitled to the legal title. On the other hand, the District asserted that those who formerly owned the lands were entitled to a further sum for the properties condemned.

After the foregoing had occurred, and on August 30, 1946, the District, represented by B. Salvini and

[2] Thereafter, on March 23, 1946, C. I. Wright and Mamie Wright, former owners of 10 acres in the District, through Messrs. Moulton & Powell and J. K. Cheadle, moved for leave to file a complaint in intervention asserting that the former landowners were entitled to be paid the value of the condemned properties (R. 11,704, pages 205–215). On June 26, 1946, the motion was denied (R. 11,704, page 290). Before the ruling was made, the following colloquy occurred (R. 11,704, pages 289–290):

"The COURT. * * * in my view of the situation it would serve no useful purpose to permit individual landowners to intervene because under my theory of it they are represented by the irrigation districts.

"Mr. POWELL. That is right."

R. S. Reierson, entered into a contract with Messrs. Moulton & Powell and J. K. Cheadle providing that "the District does hereby employ the Attorneys to represent it * * * and the Attorneys will give their best efforts and all time necessary to the proper preparation and presentation of the case in behalf of the District." Compensation was to be on a contingent-fee basis. If the award did not exceed $169,850 (the amount paid by the Government to satisfy the District's bonded debt) appellees were to receive nothing. To the extent the award might exceed that amount, they were to be paid 30 percent of the first $100,000, 20 percent of the next $100,000, 10 percent of the third $100,000 and five percent of all additional amounts (R. 4–6).

After trial of the condemnation proceeding, judgment was entered for the District for $473,356 with interest.[3] This was the value put by the jury on that part of the property condemned which in its judgment was "not devoted and applied to irrigation purposes." And, on the assumption that this recovery was for the benefit of the former landowners, both parties appealed. The Government persisted in its contention that the judgment should be nominal in amount. The District on its cross-appeal clung to the assertion made in its overruled answer, i. e., that the

[3] It will be recalled (see p. 3, *supra*) that the Government had filed a declaration of taking and deposited as estimated just compensation $170,500, which was estimated to be enough to pay off the District's bonded debt. (For that purpose $169,850 was used. The remaining $650 was paid to the District.) The judgment for $473,346 gave the Government no credit for this deposit. This Court held that in this respect the trial court erred.

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former landowners should recover the "value" of all the properties condemned.

This Court affirmed. 175 F. 2d 524. Disposing of the District's cross-appeal, it said (p. 531): "We think that the [district] court looked through form to get at the substance of the claim, and that it did not err in regarding it as an effort to secure double compensation." In respect of the Government's appeal, it held that those beneficially entitled to the District's assets could only get them when the District was dissolved in appropriate proceedings in the courts of Washington. It said (footnote 9, p. 529):

> By directing that payment * * * be made to the District rather than to the landowners, the lower court left the question of disposition of this fund to be finally decided by the State court * * *. The rights of all parties are preserved under this procedure.

It added (p. 531):

> Judge Driver was also aware that upon completion of the pending District disorganization proceeding in the State court, the proceeds of such a recovery, if authorized here, could not be retained by the District (it would pass out of existence) but would be delivered over to those entitled under State law to receive them. *This situation led the Government to assert that in any event its present ownership of all of the lands in the District made it, in effect, the real beneficiary of the trust. It may be assumed that Judge Schwellenbach so regarded this particular aspect of the case and we think*

that he reached a rational conclusion. (See footnote 9.)[4]

In other words, this Court read the judgment literally and not finding in it anything which purported to make the former landowners the equitable owners of the District's assets declined to share the parties' assumption that such was the case. On the contrary, it took the view that under state law the United States would turn out to be "the real beneficiary of the trust" when the District went out of existence as a result of dissolution proceedings in the state courts.[5]

The proceedings resulting in the order appealed from in the case at bar commenced when the trial court on receipt of this Court's mandate entered a modified judgment (R. 9–19) which was satisfied by the payment into the registry of $422,252.80. They were initiated by a petition filed by Messrs. Moulton & Powell and J. K. Cheadle for the payment to them of $78,918.85 (R. 2–4). The basis for the claim was the contract of August 30, 1946. It may be assumed that the amount asked for was computed in accordance with that contract.

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[4] Wherever in this brief italics are used, they have been added by the Government.

[5] On November 8, 1949, the United States filed in the Superior Court of Benton County, Washington, a petition asking dissolution of the District and the appointment of a receiver to receive the assets and, after paying any debts, to pay the net to the United States. Its petition was dismissed and it appealed to the Supreme Court of Washington. The appeal was argued on November 13, 1950, and the decision is being awaited.

The petition gave rise to extended hearings. At their conclusion the trial judge stated he would not give effect to the contract (R. 310). He added:

> It seems to me that the conclusion is inescapable that *at least at the time of the making of the 1946 contract the de facto directors were acting as trustees for the ultimate beneficiaries of the award paid for the District's property.* It was apparent to everybody at that time that for all practical purposes the District was out of business, that it would not ever again function as an irrigation district, and the only duty that the directors had was to protect the fund and bring in such funds as they could and protect it *for the benefit of the beneficiaries.* Those beneficiaries we do not yet, I think know who they will be. *It may very well be* * * * *that the money will be returned to the government.*

Finally, the trial judge said (R. 313):

> * * * under the circumstances of this case, where the District has gone out of business, where the funds are being brought in as trust funds *for the benefit of beneficiaries* and the beneficiaries may very well be the Government in this case, I think that the court should be somewhat conservative * * * in the matter of the allowance of fees, and I think that even in these times of inflation $50,000 is a good fee in a lawsuit.

The foregoing occurred on January 5, 1950. On February 27, 1950, the matter again came before the court. After stating that he had thought the Government would pay the $50,000, the district judge

said that if instead it appealed he would "add 10 percent and make the fee $55,000" (R. 321). As he finally put it (R. 322): "if the parties agree to have the money withdrawn in accordance with my previous ruling within ten days, then the $50,000 will stand, otherwise an order may be taken fixing the fee at $55,000."

Since the Government did not recede from its position, the order was signed on March 10, 1940 (R. 32–33). This appeal followed (R. 34).

SPECIFICATION OF ERRORS

The statement of the points relied on by the United States on its appeal (R. 65–66) may be summarized as follows:

The district court erred:

1. In entering the order appealed from.

2. In holding that the appellees were entitled to be compensated for their legal services rendered in the condemnation proceedings against the Priest Rapids Irrigation District out of the sum paid in satisfaction of the judgment entered in that case.

ARGUMENT

I

The amount paid by the Government to satisfy the judgment in favor of the District in the condemnation proceeding cannot be depleted to pay the attorneys who opposed the Government in that proceeding

Unquestionably, the directors of a corporation which has ceased to do business and consequently is about to liquidate are under a duty to collect its assets for the benefit of its creditors and *cestuis*

que trustent. (Ordinarily the latter are stockholders; in the case at bar they are those who own the lands in the Irrigation district.) And in the fulfillment of that duty, they may employ—and pay—attorneys. It is also true that "where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts." *Trustees* v. *Greenough,* 105 U. S. 527, 532–533 (1881). In making the order appealed from, the trial judge apparently invoked one or both of these principles. But neither is applicable here. For as the record in the condemnation case (No. 11,704) makes plain, Salvini and Reierson did not in employing appellees act either as collectors of corporate assets for the benefit of whomever might turn out to be the equitable owners thereof or as representatives of a class—in which the Government was included—having a common interest in a trust fund.

The condemnation case was instituted by the Government's petition contending it was the beneficial owner of the condemned property and that it could acquire the legal title thereto for a nominal consideration. Since the District had no creditors, the de facto directors were not obliged to oppose the petition. But, assuming they could, their opposition would not be on behalf of the *cestuis que trustent* but in the interest of claimants who disputed the Government's assertion that it—and not they—were the equitable owners.

And that is precisely the position taken by Salvini and Reierson. They employed appellees to oppose the Government's contention and to assert that the former owners of lands in the District had equitable title to the condemned property and that the Government was obligated to pay them many hundreds of thousands of dollars therefor.[6]

Therefore, if the Government is the owner of the District's assets (the $422,252.80 deposited by it in satisfaction of the judgment) that money cannot be levied on to pay appellees. Certainly the Government derived no benefit from making the deposit. Consequently it was not benefited by the services of appellees compelling it to do so.

Yet the order appealed from would require it to pay for those services. The district judge recognized that the question whether the United States or the former owners are entitled to the fund has not yet been determined and "may very well be" decided in favor of the United States. But in his view, even if the United States does own the money, it must pay $55,000 of it to the appellees for contesting its ownership! This is plainly wrong. For "where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such

[6] The fact that the opposition was made in the name of the District, instead of the individual claimants, did not change its character. *Mason* v. *Pewabic Min. Co.*, 66 Fed. 391, 395, *et seq.* (C. A. 6, 1894).

person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate." *Hobbs* v. *McLean,* 117 U. S. 567, 582 (1886). *Mason* v. *Pewabic Min. Co.,* 66 Fed. 391, 395, *et seq.* (C. A. 6, 1894); *Brown* v. *Pennsylvania R. Co.,* 250 Fed. 513, 524 (C. A. 3, 1918). So here, if appellees fail in their purpose to take from the Government possession of the $422,252.80, they have no right to demand payment for their services from the property they sought to misappropriate.

In reaching the conclusion which led to the order, the district judge misread the record. Thus, he said that "*at least* at the time of the making of the [August 30] 1946 contract the de facto directors were acting as trustees for the ultimate beneficiaries of the award paid for the District's property" (R. 310). Of course, that is not so. The contract of August 30, 1946, was entered into long after appellees had been employed by Salvini and Reierson and was evidently designed to fix their fees in the event they were successful in their contention.

Thus, long before the contract was made the de facto directors and the appellees were committed to a position adverse to the United States. On February 12, 1945, appellees had filed the answer contending that the former owners were entitled to recover from the Government the sum of $1,060,685 (R. 11,704, pages 161–167, p. 4 *supra*). On September 21, 1945, after this answer had been overruled, they filed the answer upon which the case was tried (R. 11,704, pages 182–191). Therein they claimed that the former

owners were entitled to recover from the Government $847,815 (R. 11,704, pages 187–188, pp. 4–5 *supra*). On June 26, 1946, the trial court declined to permit the former owners of a 10-acre tract within the District to intervene in the condemnation proceeding and claim a right to be paid for the properties on the ground—recognized by the court and avowed by one of appellees—that the would-be intervenors and all other former owners were represented by the District (R. 11,704, pages 289–290, p. 6, fn. 2 *supra*). Obviously, the trial judge was wrong in thinking that on August 30, 1946—two months after he had refused to permit former landowners to intervene—the de facto directors were still undecided or neutral in the contest between the former owners and the Government.

Accordingly, it is submitted that the order awarding appellees $55,000 of the $422,252.80 is erroneous and should be reversed.

II

The District Court was without jurisdiction to entertain the petition for payment of attorneys' fees

It is, of course, elementary that the jurisdiction of a federal court must affirmatively appear. As this Court said in *United States* v. *Green,* 107 F. 2d 19, 22 (1939):

> The District Courts of the United States are courts of limited jurisdiction, and the presumption at every stage of a cause is that the cause is outside the jurisdiction of a court of the United States unless the contrary appears from the record.

And see *Wells* v. *Long,* 162 F. 2d 842, 844 (C. A. 9, 1947). The record in the instant proceeding fails to disclose that the district court had jurisdiction to entertain appellees' application for attorney fees.

The fact that the Government had instituted a condemnation suit in that court did not confer jurisdiction. The condemnation suit has been concluded by the entry of judgment and all that remains for the trial court to do is to distribute the $422,252.80 to those found to be entitled thereto. But appellees are not parties to the distribution proceedings. They did not have any interest in the condemned property and consequently have no claim against the award. Indeed they do not contend that they have such an interest.

It thus appears that their petition for payment of fees must be treated as a new and separate suit. Whether considered as against the District, its de facto directors, the former owners or the United States, its institution is not sanctioned by any statute of which the Government has knowledge. Unless the appellees—whose petition is silent on the point—can produce statutory authority for the exercise of jurisdiction by the trial court, the order appealed from must be reversed and the cause remanded with directions to dismiss the petition.

CONCLUSION

For the foregoing reasons, it is submitted that the order appealed from should be reversed.

Respectfully,

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